

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

PHILLIP SHOOK, JR.,

Petitioner

v.

CIVIL NO. 2:93CV118-D-B

STATE OF MISSISSIPPI, ET AL.

Respondents

OPINION DECLINING TO ADOPT REPORT AND RECOMMENDATIONS  
AND DENYING HABEAS RELIEF

I. Factual Background

Petitioner Phillip Shook, Jr., a person with a serious, permanent hearing disability and diminished communication skills, is presently in the custody of the Mississippi Department of Corrections and is confined at the state penitentiary at Parchman serving a thirty-year sentence for aggravated assault and shooting into an occupied dwelling. Petitioner was convicted in the Circuit Court of Tate County on January 27, 1987. His conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court on October 4, 1989. Shook v. State, 552 So. 2d 841 (Miss. 1989). Presently before the court is the petitioner's writ of habeas corpus under 28 U.S.C. § 2254.

The magistrate judge narrowed the issues of inquiry at the federal evidentiary hearing on March 29, 1996, to these possible meritorious grounds – 1) whether the petitioner's due process rights were violated by requiring him to stand trial if his deafness rendered him physically and mentally incompetent to stand trial and 2) whether the petitioner's due process rights were violated by the trial court's refusal to grant a continuance until he could be taught sign language<sup>1</sup>.

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<sup>1</sup> The petitioner also raised the issue of whether his Fourth Amendment rights were violated by the admission of evidence seized pursuant to a consent to search form which petitioner contends he was incompetent to give. The magistrate judge found the petitioner's Fourth Amendment claim to be without merit. Petitioner's Fourth Amendment claim was heard during a pretrial suppression hearing (TR 981-1006), and on direct appeal, Shook v. State, 552 So. 2d 841, 846-48 (Miss. 1989). This claim is barred from federal review since it was afforded the opportunity for consideration as required in Stone v. Powell, 428 U.S. 465, 482, 96 S. Ct. 3037,

Petitioner asserts that he was incompetent to stand trial because his deafness rendered him unable to understand the criminal proceedings against him and prevented him from consulting with or assisting his attorney in preparing his defense. Petitioner did not know sign language at the time of trial.

Respondents argue that the trial judge was aware of petitioner's disability and made every possible effort to compensate for his deafness during the trial, including obtaining a highly qualified court interpreter and delaying the trial for a competency evaluation at the state mental hospital at Whitfield. Respondents also argue that petitioner's disability was not as acute as he claims, i.e. that the record is replete with the testimony of friends, teachers and coaches who cite examples of his communications skills. Respondents further point to the report from Whitfield State Hospital as evidence that petitioner was malingering and clearly able to comprehend what was going on around him.

## II. 28 U.S.C. § 2254 Standard

According to 28 U.S.C. § 2254, state court determinations in a habeas action made after a hearing on the merits of a factual issue are presumed correct. Maggio v. Fulford, 462 U.S. 111, 118, 103 S. Ct. 2261, 2264, 76 L. Ed. 2d 794 (1983)(competency of defendant declared issue of fact). The Fifth Circuit has held, “[w]e are bound to respect the state court’s findings and accord them a presumption of correctness under 28 U.S.C. § 2254 and Sumner v. Mata, 449 U.S. 539, 549-51, 101 S. Ct. 764, 770-71, 66 L. Ed 2d 722 (1981).” Clark v. Collins, 956 F.2d 68, 72 (5<sup>th</sup> Cir. 1992). In 1996, however, prior to the enactment of the Antiterrorism and Effective Death Penalty Act, there existed eight exceptions to this rule, and the magistrate judge found that at least one of the exceptions applied in this case, citing specifically 28 U.S.C. § 2254(d)(7). That subsection read in part, “. . . that the applicant was otherwise denied due process of law in the State Court proceeding . . .” 28 U.S.C. § 2254(d)(7).

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3046, 49 L. Ed. 2d 1067 (1976)(holding where the state has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on this ground).

### III. Discussion

The magistrate judge found that pursuant to 28 U.S.C. § 2254 the petitioner was denied due process finding that he was incompetent to stand trial. The magistrate judge also found that the petitioner's due process rights were violated because the trial court did not delay the trial indefinitely so the petitioner could be taught sign language.

This court, however, has the power to reject the magistrate judge's credibility findings pursuant to the authority found in Jordan v. Hargett, 34 F.3d 310, 313-14 (5<sup>th</sup> Cir. 1994), which holds that a district court may reject the magistrate judge's credibility-based fact findings only when the district court conducts its own evidentiary hearing. This court held its own evidentiary hearing on February 16, 2000.

After reviewing the report and recommendation of the magistrate judge, this court determined that the record was incomplete and that an evidentiary hearing was required to address the specific issue of the petitioner's competency to stand trial during his state court criminal trial over ten years ago. Specifically, the court was interested in hearing evidence concerning the petitioner's ability to comprehend the English language in written form.

The court focuses on this issue because the petitioner is deaf, and at trial, his interpreter handwrote the testimony for him as it transpired. This court now must determine whether the interpreter adequately facilitated the petitioner's ability to consult with his attorney and understand the proceedings against him.

A defendant's right to effective assistance of counsel is impaired when he cannot cooperate in an active manner with his attorney. Riggins v. Nevada, 504 U.S. 127, 144, 112 S. Ct. 1810, 1819, 118 L. Ed. 2d 479 (1992). In Mississippi, the state bears the burden to prove competence by a preponderance of the evidence. See Griffin v. State, 504 So. 2d 186, 191 (Miss. 1987) (expressly rejecting a clear and convincing standard). In federal court as well, an accused must prove incompetence by a preponderance of the evidence. 18 U.S.C. § 4241.

On September 29, 1986, a motion hearing was held in the Circuit Court of Panola County

to decide a number of pretrial motions, including the motion of competency to stand trial.

Testifying at the hearing were two witnesses for the defense, Dr. McKay Vernon and Ms. Marie Griffin. Dr. Vernon is a well-known and eminently qualified expert on deafness; Ms. Griffin is a nationally certified interpreter for the deaf with a specialization in legal interpretation. Dr. Vernon testified that Shook is profoundly deaf and even with an excellent interpreter, such as Marie Griffin, he would probably understand no more than five percent of what was going on around him.

The trial court judge appointed Ms. Griffin of Knoxville, Tennessee, as oral interpreter for Shook's benefit during all stages of his trial. By all accounts both then and now, Ms. Griffin is probably the most qualified oral interpreter in the Southeastern United States. Her qualifications include the following: CSC (Comprehensive Signing Certificate); SC:L (Special Certificate-Legal); OIC:C (Oral Interpretation Certificate- Comprehensive); and, CI (Certificate of Interpretation). All agree that Phillip Shook was provided the best possible qualified oral interpreter available at the time of trial.

Although the petitioner's counsel concurred that the interpreter was qualified and able to accurately interpret the statements of the defendant and of the proceedings, he filed a motion to continue the trial indefinitely until the defendant could be taught to sign. The trial court, after reviewing the motion and all evidence presented, denied the motion and made this observation:

I will state quite frankly that I had the opportunity yesterday to observe this defendant in open court at counsel table along with his attorney and with the oral interpreter, Ms. Griffin. And likewise, in getting away from established procedure and rules, I even permitted the defendant's father, Mr. Shook and the defendant's sister, Betty Shook, to be at counsel table. **But I observed at least on a couple of occasions the defendant simply looking away from Ms. Griffin. There's got to be cooperation on the part of everyone including this defendant.**

. . . .

So I recognize the problems indicated by Mr. Tollison [attorney for petitioner] in communicating. Through my months now of observation, **I think some of the problems are the defendant's unwillingness to cooperate.**

I've done everything I feel like within my power and authority to assure this defendant of a constitutionally fair trial. Taking into consideration his hearing

impairment, I appointed an oral interpreter at the defendant's request. She's here assisting. And I think and truly believe that she can be of valuable assistance to this Court and especially to this defendant if the defendant will let her.

State Court Transcript, pp. 1384-85, 1388-89 (emphasis added).

The trial court reviewed all evidence presented prior to trial and found that Shook, with the assistance of Ms. Griffin, was competent to stand trial and denied the defendant's motion for a continuance. Trial Transcript, p. 929. For the reasons stated, this court is in agreement with the Mississippi Supreme Court's affirmance of the trial judge's decision not to indefinitely delay the trial:

We find this assignment to be without merit. The court had no way of ascertaining whether the defendant would learn that language nor the degree to which it could improve his real ability to understand and communicate. Philip could read, and the record shows that the interpreter kept him well informed as the trial progressed. We can appreciate that it was not easy for counsel to discuss the defense with him, but, clearly it could be done. A trial should not be postponed indefinitely if any reasonable alternative exists. . . . This record shows, beyond doubt, that the trial judge reasonably concluded that Philip could communicate with those around him sufficiently to permit him to function in a reasonably normal fashion. He was not illiterate nor blind. He is a high school graduate and was a college student. During the trial he was kept advised of what was being argued and what the testimony was. The authorities cited by counsel either arise from different factual backgrounds or support the conclusion we have set out above.

Shook v. State, 552 So. 2d 841, 844-45 (Miss. 1989).

The standard for competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824, 825 (1960). A criminal trial of an incompetent defendant violates due process. Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 838, 15 L. Ed. 2d 815 (1966). Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to

testify on ones' own behalf or to remain silent without penalty for doing so. Drope v. Missouri, 420 U.S. 162, 171-72, 95 S. Ct. 896, 904-04, 43 L. Ed 2d 103 (1975).

The magistrate judge based his findings predominately on the testimony of the petitioner's counsel (an interested party) and the testimony of the Dr. Vernon, a psychologist widely recognized as an authority on the psychological aspects of deafness, who was of the opinion that the petitioner was incompetent to stand trial. The magistrate judge opined:

While it is obvious that the state court trial judge took extraordinary care in his handling of this very complicated and difficult matter, trial circumstance, it appears from a review of those proceedings that the judge relied upon the testimony of lay persons and "experts" at the state hospital who admitted they had no expertise in working with the deaf to support a finding that petitioner was malingering and competent to stand trial. The only experts worthy of the name, Dr. Vernon and Marie Griffin, both testified to petitioner's complete inability to comprehend the proceedings against him and to communicate with his attorney.

Report and Recommendation, p.8.

The most recent depositions of Dr. Vernon and Ms. Griffin took place on March 17, 2000, upon this court's directive. These depositions focused on the petitioner's ability to understand the written language. Upon reviewing the latest testimony, the undersigned does not agree with the magistrate judge's finding that both experts testified to the "petitioner's complete inability to comprehend the proceedings against him . . ." Report and Recommendation, p. 8. It is not disputed that Dr. Vernon is the best in his field and this court is not questioning his credibility; rather, this court finds the totality of testimony of all others who testified, especially Ms. Griffin, more persuasive.

Ms. Griffin described her responsibility as rewording and restructuring the English language in order to make it more comprehensible to the petitioner. "I felt like it was much more important for me to get the points of the different testimonies and comments being given across to him in a form that he could understand rather than worry about anything approaching a verbatim transcription." March 17, 2000 Telephonic Deposition of Marie Griffin, pp. 6-7. Not all of the communication between Ms. Griffin and the petitioner was written. "There were things that I did find that he was able to understand. . . . I did draw some rough diagrams that I used

when locations, relative locations were being discussed . . . I did some pointing to indicate who was either speaking or being spoken about.” Id. at p.7.

In particular, Ms. Griffin’s deposition of March 17, 2000, relates her expert opinion that she believed Phillip Shook understood the proceedings against him. She states repeatedly that it was her opinion that, in general, the petitioner knew what he was accused of and knew that he could suffer major consequences as a result of what was transpiring at trial. Most revealing is the following:

Q. When someone was testifying, did you get the overall impression that he understood what they were saying?

A. I think that he did. And if he didn’t, he usually let me know. And he seemed to be able to tell which people were testifying—saying things that were favorable to his case, because he would nod and smile and seemed glad about some testimony. There was other testimony given where he would shake his head and even want to refute the testimony maybe in writing to me.

March 17, 2000 Telephonic Deposition of Marie Griffin, p. 32.

When asked if she had the opportunity to observe the petitioner’s handwriting, she stated:

He wrote a few little notes to me on the note pad . . . [S]ometimes what he would be wanting to write would be like a rebuttal to some testimony that was being given . . . So there were times when he would attempt to write to me that I would strongly discourage it because he was getting off onto rebutting testimony . . .”

Id. at p. 24.

The issue now before the court is whether he had the present ability to communicate. The court finds the above testimony convincing as evidence of the petitioner’s comprehension and his present ability to consult with his lawyer with a sufficient degree of rational understanding.

Ms. Griffin testified that the petitioner relied on written communication much more than speech reading. March 17, 2000 Telephonic Deposition of Marie Griffin, p. 35. Ms. Griffin was of the opinion that the petitioner was not well-versed in speech reading, with the exception of his family members “with whom he’s very familiar.” Id. at p.37. To that end, in addition to Ms. Griffin being seated at the defense table at trial, the trial judge allowed the petitioner’s father and sister to sit at the defense table to assist him in communication.

In light of Ms. Griffin's very credible testimony, the court agrees with the trial court and concludes that the petitioner could communicate with those around him sufficiently to permit him to function in a reasonably normal fashion. He was neither illiterate nor blind. He is a high school graduate and attended college at the University of Mississippi.

Furthermore, the trial judge had ample reason in this matter to hold the defendant competent. Several lay witnesses, who had contact with the petitioner on a daily basis, attested to the petitioner's ability to adequately read and comprehend the written language. The court finds that Ms. Griffin kept the petitioner well informed as the trial progressed. She testified that everything was done to accommodate the petitioner at that point in time with the abilities that the petitioner had and the technology that was available. March 17, 2000 Telephonic Deposition of Marie Griffin, p. 37. The trial court recognized the petitioner's deafness and took the appropriate steps to protect his rights by appointing an oral interpreter to aid him in the only language he had ever known.

As stated previously, Dr. McCay Vernon, who testified on the petitioner's behalf, is of the opinion that the petitioner was incompetent to stand trial. However, the Fifth Circuit has stated, "[a] defendant is not entitled to a judgment of [incompetence] simply because he offers expert testimony on the issue of insanity [or deafness] and the Government attempts to rebut it without any expert witnesses. The expert's opinion, even if uncontradicted, is not conclusive." United States v. Hall, 583 So. 2d 1288, 1294 (5<sup>th</sup> Cir. 1978); see also United States v. Mota, 598 F.2d 995, 999-1000 (5<sup>th</sup> Cir. 1979). Dr. Vernon spent less than a half of a day with Phillip Shook fourteen years ago and reviewed the test evaluations made by others. The court finds that his testimony is more of a generalization from studies conducted, rather than any specific observation.

The testimony of respondents' two experts on deafness stand to be repeated. Mr. B.H. Stringer, Executive Director of the Mississippi Association of the Deaf, was called as an expert witness at the first federal evidentiary hearing before the magistrate judge. He testified that when



a deaf person has been educated orally, as with the petitioner, that is their language and signing is simply not done. It was his opinion that it would take two to three years for a person orally educated all his life to learn to sign. Evidentiary Hearing Transcript I, pp. 113-14.

At the first federal evidentiary hearing, Gary Neely, Director of Deaf Services, Mississippi Department of Rehabilitation Services, was also of the opinion that the petitioner was afforded reasonable and adequate accessibility during trial by being provided with an oral interpreter. He also stated it would take two to three years for a person such as the petitioner who had been orally educated all his life to learn sign language. Id. at 124.

In reviewing state courts' findings, the federal habeas corpus courts must use a "high measure of deference." Marshall v. Lonberger, 459 U.S. 422, 433, 103 S. Ct. 843, 850, 74 L. Ed. 2d 646 (1983). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record." Id. This the court cannot conclude.

The trial court took all reasonable measures which adequately safeguarded the petitioner's constitutional rights. The express finding in the state court record of the trial court judge reflects the fair-minded consideration given the facts of this case and shall be accorded absolute deference. The court finds that the petitioner's constitutional due process rights were not violated in his state court trial.

Accordingly, the portion of the magistrate judge's report and recommendation that the petitioner's constitutional due process rights were violated is hereby **OVERRULED**. The petition for writ of habeas corpus is **DENIED WITH PREJUDICE**.

A separate order in accordance with this opinion will issue this day.

SO ORDERED, this the \_\_\_\_\_ day of \_\_\_\_\_ 2000.

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United States District Judge